

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 315
5597767

BETWEEN PALMCO GARDENS LIMITED
Applicant

A N D JOHN WELCH and MONIKA
WELCH
Respondents

Member of Authority: T G Tetitaha
Representatives: K Taurau, Counsel for Applicant
S Bliss, Advocate for Respondents
Investigation Meeting: 14 September 2016 at Kerikeri
Submissions Received: 14 September 2016 from both parties
Date of Oral Determination: 14 September 2016
Date of Written Determination: 16 September 2016

DETERMINATION OF THE AUTHORITY

- A. The application for penalty against John Welch is dismissed.**
- B. Monika Welch breached the settlement agreement dated 16 March 2016 by making the derogatory comment about Palmco Gardens Limited that her partner had been laid off for no reason.**
- C. I decline to award any penalty. The application for penalty against Mrs Welch is also dismissed.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of**

this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Palmco Gardens Limited seeks a penalty from John and Monika Welch for breaching a settlement agreement. It alleges Ms Welch made disparaging remarks about Palmco Gardens Limited to Nicole Walker.

Relevant Facts

[2] John Welch was employed by Lammerting Investment Group Limited (LIG) in 2007. LIG operated a business known as Palmco, a local palm tree business that had achieved some national recognition for its landscaping.

[3] In February 2014, LIG was liquidated. Palmco Gardens Limited (PGL) was created as a trading company. Mr Welch's employment transferred from LIG to PGL from thereon.

[4] In May 2014, Mr Welch's employment ended.

[5] On 16 September 2014, Mr Welch and PGL concluded a confidential settlement agreement. That agreement included the term:

John Welch and Monika Welch agree that they shall not make disparaging comments regarding ... Palmco Garden Limited ...

[6] Only Mr Welch signed the agreement. Monika Welch was present during the settlement negotiations.

[7] In May 2015, Nicole Walker and her family relocated from Auckland to Kerikeri.

[8] In August/September 2015, Ms Walker and her partner were negotiating the purchase and lease of a café located on LIG's former Palmco premises. Ms Walker wished to source local artwork for display at the café. Monika Welch was recommended to her.

[9] On or about 8 October 2015, Ms Walker rang Monika Welch regarding displaying her art at the café. It is during this conversation that it is alleged Monika Welch made disparaging comments about PGL.

[10] That same day, Ms Walker and her partner rang Kristen and Udo Lammerting, shareholders in PGL, about the comments made by Monika Welch. They were concerned about the negative effect upon the business they were intending to purchase. Ms Lammerting asked Ms Walker and her partner to write a letter setting out what they allege was said by Monika Welch. A letter was written on or about 10 October 2015 setting out Ms Walker's recall of the comments Ms Welch made.

[11] By 22 October 2015, PGL instructed a lawyer to write to Mr and Mrs Welch noting the disparaging comments about PGL and seeking confirmation that there would be no further breaches.

[12] By letter dated 29 October 2015, Mr and Mrs Welch's advocate replied. She confirmed Mrs Welch accepted she had spoken to Ms Walker but had only said upon learning the café was located at the business known as Palmco that she had said "*I was not interested at all and never would be*" and "*could not comment any further as she had signed a settlement document*".

[13] Ms Walker was asked to comment again and sent a further letter dated 4 November 2015. This letter gave more detail about what was allegedly said by Monika Welch.

[14] The parties were unable to resolve matters and they have now come before me for determination.

Issues

[15] The issues for hearing were determined at an earlier stage. They are:

- (a) Did Monika Welch make disparaging comments about PGL and/or Kristen Lammerting to Nicole Walker?
- (b) If so, should a penalty be awarded?

Did Monika Welch make disparaging comments about PGL and/or Kristen Lammerting to Nicole Walker?

[16] PGL submits that Ms Walker's evidence is more credible than Mrs Welch's. It says there can be no doubt Mrs Welch made the disparaging statements about PGL. This is because Ms Walker was more credible and she has no reason to lie.

[17] Mrs Welch denies she said anything to Ms Walker other than:

- (a) She was not happy for her daughter to work there;
- (b) Her husband, John Welch, was a former employee who had been trespassed;
- (c) He had been made redundant; and
- (d) He had a settlement with PGL and she could not speak about it.

Law

[18] The applicant seeks a penalty under s.134(2) of the Employment Relations Act 2000 (the Act). This provides a penalty to be awarded for “*every person who incites, instigates, aids or abets any breach of a settlement agreement*”.

[19] To be liable for a penalty for breaches of an agreed term of settlement, the respondent must have known both of the fact of a settlement having been achieved and of the relevant terms of that settlement.¹

[20] To instigate is defined as “*to bring about or initiate an action or event*”.² To be disparaging is to express an opinion that something was of little worth to make a derogatory comment.

[21] This matter primarily rests on my determination of the credibility of Ms Walker and Mrs Welch. There is a substantial conflict of evidence between the parties. This requires me to make express findings of credibility based upon what I have heard and read from each of the witness at the hearing.

[22] Credibility can be assessed on two bases: the witness personally and the story that witness tells me. Factors that are relevant to personal credibility include demeanour, inconsistencies and contradictions of all kinds, prevarication, reasons to lie, and concessions made where due despite any perception by the witness of a risk to their credibility by giving that evidence.

¹ *Musa v Whanganui District Health Board* [2010] NZEmpC 120 at [57].

² The Oxford Dictionary online <http://www.oxforddictionaries.com/definition/english/instigate>.

[23] Credibility of the story is an assessment of it within the context of other evidence such as undisputed facts, or facts unknown to the witness. I ask myself is this evidence absurd or is there other evidence making that conclusion inevitable.

[24] I may draw inferences and fill in gaps in evidence by application of my own commonsense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation. The burden of establishing each of the disputed factual elements lies with the applicant and the standard is the balance of probabilities.

Determination

[25] The allegations were Mrs Welch and by inference Mr Welch instigated a breach of the settlement agreement by making disparaging comments about PGL to Ms Walker. The comments included allegations of unpaid taxes, “her partner being laid off for no reason”, trespass notices, court cases, lack of funds and the Welch’s receiving a \$20,000 settlement.

Did John Welch breach the settlement agreement?

[26] The answer is no. I accept his evidence that he was unaware of his wife’s conversation with Ms Walker until after it had occurred. He was not a party to the conversation with Ms Walker. He had never met her until today. The application for a penalty against John Welch is dismissed. Costs are reserved.

Did Monika Welch breach the settlement agreement?

[27] It is accepted Monika Welch knew about the fact of the settlement and the contents of the agreement when she spoke to Ms Walker on 8 October 2015. It also appears accepted by Mrs Welch that Ms Walker was shocked by what she had told her. This is corroborated by Ms Walker’s evidence that she was so concerned she spoke to the Lammerting’s that evening regarding the viability of continuing with their business purchase.

[28] This evidence logically suggests to me that something more than what was asserted by Mrs Welch was discussed in that conversation. If it had been of the level Mrs Welch asserts, I doubt Ms Walker would have been as shocked as both state.

[29] Mrs Welch's evidence at hearing about what was said was also inconsistent with the admissions she made through her advocate on 22 October. More detail about the conversation included an admission she did state her partner was trespassed and made redundant.

[30] However, I do not accept everything Ms Walker alleges was said by Mrs Welch. Ms Lammerting and Ms Walker were primarily concerned about finalising the purchase of the café business. By the time Ms Walker produced the comments she said Mrs Welch had told her into writing, she had already discussed them with her partner and with Ms Lammerting. I infer they may have added some of the detail Ms Walker asserts was said by Mrs Welch. In a letter dated 4 November 2015 for example she alleges Mrs Welch said Mr Welch received a \$20,000 settlement. This was incorrect because he received far less. This seems more likely to have been suggested by Ms Lammerting who referred to various discussions about this figure in evidence.

[31] I do accept Ms Walker's letter dated 10 October 2015 contains comments Monika Welch would have known or made. Parts of the letter were matters she accepted in evidence were discussed e.g. trespass notices and her husband's redundancy. Ms Walker alleges Mrs Welch's comment was "her partner had been laid off for no reason." The impression I had of Mrs Welch's evidence was she would have said this. She was upset by Mr Welch's dismissal and believed it was unfair even today.

[32] The reference to her partner being trespassed and settlement were not disparaging comments on their own. However Mrs Welch's comments about her husband being laid off for no reason or even made redundant then settled infers PGL had done something wrong. This is in breach of clause 8 of the settlement agreement which states Mr Welch's employment "ended by agreement on 30 May 2014." It did not end by redundancy or him being laid off for no good reason. Her odd behaviour at the end of the telephone call stating her daughter would not work there, husband trespassed etc also inferred something had gone wrong with PGL.

[33] I have determined on the balance of probabilities that it was more probable than not Monika Welch breached the settlement agreement dated 16 March 2016 by making the derogatory comment about Palmco Gardens Limited that her partner had been laid off for no reason.

Should a penalty be awarded?

[34] I have a discretion to either award a penalty claimed or dismiss the action under s.135(4) of the Act. The Employment Court has determined a non-exhaustive list of factors that may be considered in deciding if an award should be made and quantum.³

[35] One factor is seriousness of the breach. All breaches of settlement agreements are serious. I accept the applicant's submission that public confidence in s.140 settlements will be undermined if there is acceptance that they can be breached with impunity.

[36] Another factor is whether the breach was one-off or repeated. In my view it was a one-off breach. I accept Monika Welch's evidence that she was surprised by the information about the location of the café owned by PGL, her husband's previous employer. I accept that in that shock she may have inadvertently 'blurted out' comments about her husband's situation. There is no evidence of any predetermined motive by Mrs Welch to make these comments.

[37] I have to consider the impact upon the employer. The comments were not broadcast wider than Ms Walker her partner and Mr and Mrs Lammerting. There are allegations of reduced rentals but little to show this was directly caused by Mrs Welch comments only or from subsequent enquiries the Walkers made. The \$20,000 settlement with another employee was still due and owing at the time and would have impacted upon their decision to purchase PGL as opposed to lease.

[38] Some of the comments were also truthful and/or public knowledge. It was accepted Mr Welch was served with a trespass notice in a public place. There have been articles in local papers in May 2014 about LIG's debts from Palmco and on 17 July 2015 about the \$20,000 compensation award to an ex-PGL employee. This would have had more effect upon PGL's reputation and saleability of the café than Mrs Welch's comments some months later.

[39] There is a need for deterrence. In my view, deterrence can be served here best by publication of this decision. This is a small town. All of these peoples' reputations are at stake. Publication of the breach by Mrs Welch should serve as

³ *Tan v Yang & Zhang* [2014] NZEmpC 65 at para.[32].

sufficient deterrence for anyone else including other ex-PGL employees intending to breach confidential settlement agreements. Mrs Welch is still liable to pay a sum yet to be determined towards PGL's legal costs for her actions in any event.

[40] I decline to award any penalty. The application for penalty against Mrs Welch is also dismissed.

[41] Costs are reserved. Parties should seek to agree an award of costs. The starting point for costs is \$3,500. If unable to agree a party who seeks an order for costs shall file and serve a memorandum 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority